

**SHARPING CLARK, JR. vs. SHARPING**

**CONCRETE BLOCKS**

**MIDDLE WEST CONSTRUCTION, INC. vs. MIDDLE WEST CONSTRUCTION, INC.**

**THE MIDDLE WEST CONSTRUCTION, INC.**

**REPLY TO THE PETITION OF THE MIDDLE WEST CONSTRUCTION, INC.**

**A WRIT OF HABEAS CORPUS IN THE MATTER OF THE MIDDLE WEST CONSTRUCTION, INC.**

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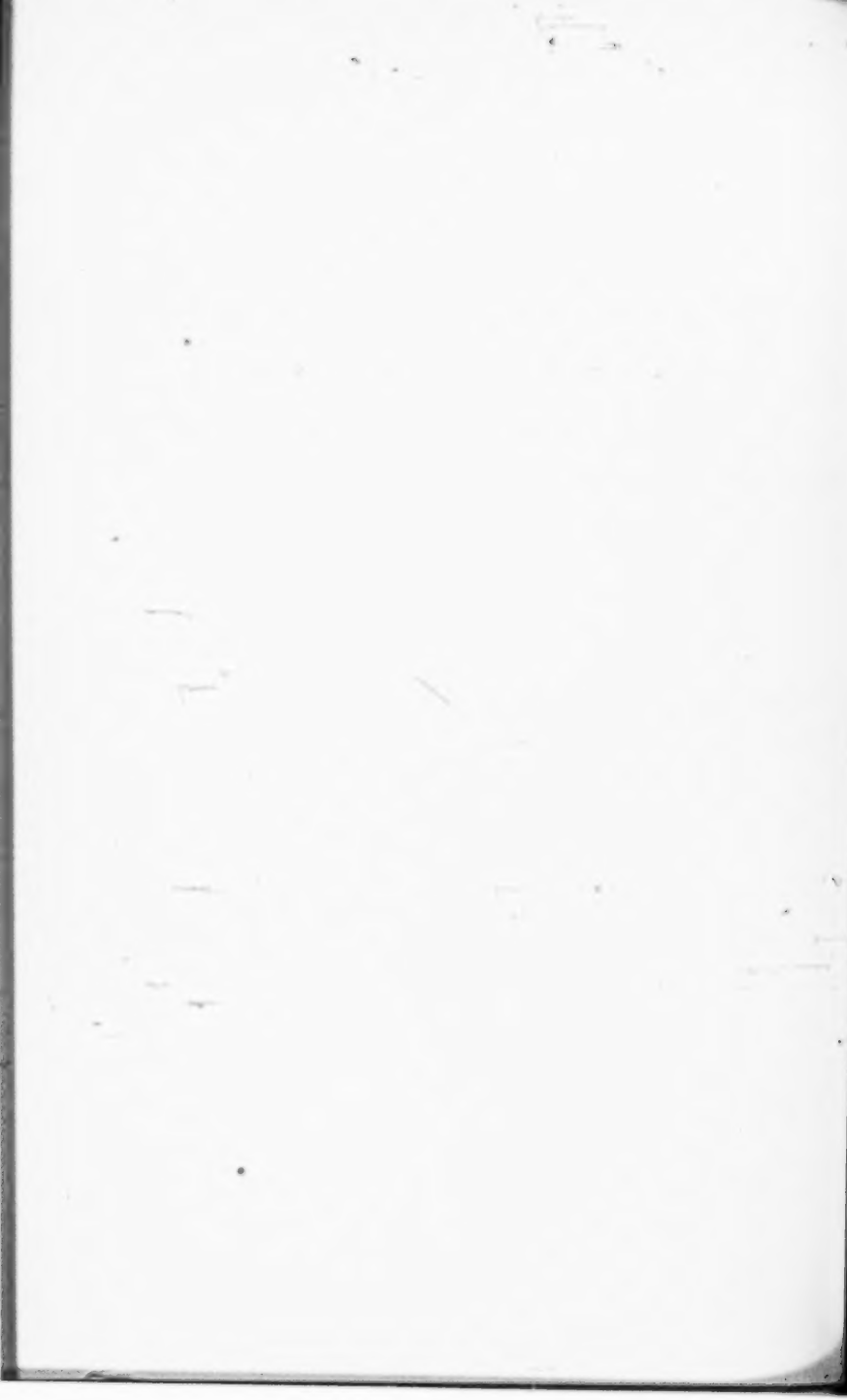
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*Both lower Courts were clearly wrong in their construction and application of the contract—a pure question of law, Mazzotta v. Bornstein, 104 Conn., 430, 435—because they did not construe it in accordance with applicable decisions of Connecticut's Supreme Court.*

*Erie Ry. Company v. Tompkins, 304 U. S. 64.*

From *Eldridge v. Hawes*, 4 Conn., 465, 469, to *Mackey v. Dobrucki*, 116 Conn., 666, and beyond in both directions, the guiding star in this State has been doing justice between both parties, and avoiding injustice, hardship, oppression and over-reaching by one party even though he may have some technical “legal right.”

In the *Mackey* case, *supra*, the Court says:

“ . . . Equity will relieve a party against forfeiture and penalties not occasioned by his wilful neglect, upon the principle that one having a legal right shall not be permitted to avail himself of it for the purpose of injustice or oppression . . . .” (Italics ours).

An analysis of the applicable Connecticut cases (Main Brief, pp. 2-17) should convince any reasoning mind that contracts are to be construed to do equity and justice between both parties, reached by the rules of reason, judicial logic, and the application of equitable principles; to render justice and to avoid injustice and oppression.

This Honorable Court long ago laid down the same principles.

*Hume v. United States, 132 U. S. 406.*

Applied to this case, where the contract, Ex. A, 4 blue-prints, Exs. B, C, D and E, admittedly comprise the entire contract (Respondent's Brief, p. 1), a just and equitable

result was not reached, but a strained and unreasonable construction placed on these written documents which results in hardship, injustice, oppression, and inequitable consequences to petitioner, and to the unjust enrichment and material increase and advantage of respondent.

*Tryon v. White*, 62 Conn., 161ff.

*E. & F. Construction Co., v. Stamford*, 114 Conn., 250ff.

*Blakeslee v. Water Comrs.*, 121 Conn., 163-180.

*Blakeslee v. Water Comrs.*, 106 Conn., 642ff.

Cases cited in *Main Brief*, pp. 2-17.

*Patently, respondent's Argument, which both Lower Courts adopted, is divorced from reason, from the objects reasonably contemplated by the parties, from their situation, and from their real intention in entering into the contract. The written documents they executed present pure questions of law, as they comprise the entire contract.*

*Mazzotta v. Bornstein*, 104 Conn., 430, 435.

*Salt Lake City v. Smith*, 104 F. 457.

They fix the scope of the undertaking and limit the risks to what is therein set forth, and are to be construed against the author.

*Day v. United States*, 245 U. S. 159.

*Carnegie Steel Co., v. United States*, 240 U. S. 156.

*Every intendment is to be made against a construction which would operate as a "snare." A harsh and oppressive one will not be adopted.*

*Utley v. Donaldson*, 94 U. S. 29, 46-48.

*Memphis v. Brown*, 20 Wall. 289.

Business contracts must be construed with *business sense*, as they naturally would be understood by intelligent men of affairs.

Notwithstanding these cardinal rules of construction universally recognized and applied, respondent, under cover of the contract, enlarged and remoulded by its Engineer, whom both lower Courts erroneously construed to have "very extensive discretion" and power to enlarge and remould the contract as being "within his contractual powers," (R. p. 34, top; 133 *F. 2d* par. 2, p. 469), sought and obtained for itself large benefits, without paying therefor. In addition, by invoking the "general terms" and "broad stipulations" of this, a municipal contract, prepared by its attorney to insure it being air-tight, it also sought and obtained from said Courts a construction of that contract which was not only over-literal and unjust, but one which took no reasonable account of the "special provisions" which both parties expressly agreed should govern (Ex. A, p. 40), nor of the "restrictive clauses" appearing generally in the same paragraphs (Petition, p. 5), and thus enlarged and remoulded the contract to its increase and advantage.

Long ago, both this Honorable Court and the Connecticut Supreme Court and the great weight of authority forever put an end to such a construction.

In *Miller Bros. v. Maryland Cas. Co.*, 113 Conn., 504, 514, our Supreme Court held that a trial court cannot ignore the *restrictive provisions* and that *particular language must prevail over the general*.

In *Smith v. McCullough*, 104 U. S. 25, this Honorable Court held general words in a written instrument cannot be detached from explanatory words immediately following, in determining its meaning.

In *Mutual Life Ins. Co., v. Hill*, 193 U. S. 551, it held that where parties express themselves in "special terms", attention is directed to the "special matter" and it must be assumed that it expresses their intent, while "general mat-

ter" does not mean the parties had that *particular matter in thought*.

In *Water Comrs. v. Robbins*, 82 Conn., 623, our court pointed out the importance of this principle to an intelligent appreciation of the questions involved, saying:

"... A closer analysis reveals that the real character of the fraud ... is thus too narrowly stated. That fraud is one which resulted not only from the actions ... inducing the contract ... by means of ... representations purporting to be based upon information as to what its general terms and elastic language as related to the uncertain conditions involved in its subject matter would require of them in the performance of the work undertaken, but also from the disregard of these representations ... made in subsequent actions and requirements under cover of the terms of that contract thus obtained. It is the advantage taken of the indefinite terms of the contract to exact what the contractor had been led to believe by authoritative statements and representations would not be exacted that furnishes the real cause of complaint and fills out the measure of fraud.

*The representations involved there, as here, the approximate amount of work comprehended in the project as contained in the written documents issued by the Commission and its Engineer, which the Court construed to carry an assertion of superior knowledge and information for the purpose of supplying knowledge and information to bidders they expected to act upon, in a business dealing, and who were entitled to and did promptly act upon it as information having a basis in superior knowledge, not equally available to bidders, and involving investigation of conditions, study, and computations requiring expert knowledge, "if not also a search of the minds and purposes of the members of the board."*

It held that the Commission was in a position there, as here, to have "not only a superior knowledge, but also a knowledge which had a *foundation in expert examination and study*," made to be acted on, and promptly acted on, and con-

sequently, as to "any affirmation contrary to the truth" to secure some benefit, the law will hold it liable although it spoke in "ignorance of the facts." (citing cases).

In the eyes of the law as there expounded, petitioner did not act at its "peril" in relying, as it did, upon respondent's representations. That case expressly holds that the law sanctions no such proposition. This principle accords with that laid down in *Hollerbach v. United States*, 233 U. S. 165; and *Christie v. United States*, 237 U. S. 234, and others too numerous to cite, that it made a representation upon which petitioner had a right to rely without an investigation to prove its falsity. The latter also takes into consideration that "time" did not permit one, and such representations are based upon specific investigation which protect against extravagant price based on conjecture of conditions, and that it made no difference they did not have a sinister purpose in making them. Here, it was expected petitioner would rely and act upon them as a basis for making its bid. (Mr. Brewer, pp. 914, 929, 968-970).

Both lower Courts were clearly wrong in basing their decisions upon warnings in the blueprints (R. pp. 36, 37, 38) involving directly Claims 2, 3, and 6, but in result, 1, 2, 3, 5, 6, 9, 10, 11, 12, 13, 14, 15, amounting to \$62,000, or 90% of all claims. The other claims are extras under express terms of the contract, referred to in Main Brief under individual claims.

The representations in the documents are presumed, as matters of law, the inducing, though it need not be the only inducing cause; here, respondent, expected us to rely upon the express representations in the documents, and knew errors or mistakes would put a bidder at a disadvantage. (Mr. Brewer, p. 914).

*Taylor v. Sprague*, 58 Conn., 542.  
*Hollerbach v. United States*; and *Christie v. United States*, and cases herein and Main Brief, pp. 2-17.

These contract rights of petitioner, resulting from these decisions, and others, culminating in *E. & F. Constr. Co., v. Stamford*, 114 Conn., 250, 259, 260, establish its right of recovery in contract or in tort, in the nature of a breach of warranty, even though such representations were made innocently and in perfect good faith; whereas, both lower Courts interpreted the situation as falling within the field of fraud. (R. p. 46, par. 3, under Conclusions of Law; 133 F. 2d. par. 6, p. 470).

*Both said Courts clearly erred in their construction and application of our local law of innocent representations and were clearly wrong in denying recovery because they concluded there was no fraud, misrepresentation or misleading.*

*E. & F. Constr. Co., v. Stamford*, 114 Conn., 250ff. and numerous cases and authorities cited and discussed.

The bases of recovery in Connecticut and many other States, and in federal Courts are not so narrowly restricted, but recovery is allowed on some other theories, most appropriate of which is *quantum meruit*. In all of the cases recovery is allowed to avoid injustice to the contractor and unjust enrichment to the owner. In the *E. & F.* case, *supra*, our Court says:

" . . . The plaintiff is entitled to redress in this action for its loss, due to defendant's misrepresentations, equally with its right to rescind . . . and for the same reason, that it would be unjust for a party, who has made misrepresentations, even innocently, which concerned the subject-matter of the contract, and induced the other party to enter into it, to retain the fruits of a bargain induced by such misrepresentation . . . The defendant is responsible for the consequences of the plaintiff's reliance on its misstatements regardless of whether made in good faith."

*There reasons, buttressed by these cases constituting the weight of authority, we submit, are sufficient grounds for granting our petition.*

The tort rationale is inappropriate in most cases, as here, where the deviations between estimate and actuality may have resulted from inherent unpredictability of work to be done and it cannot be reasonably said that the minds of the parties have met on the work actually necessary to complete the contract where actuality belies estimate and representations. Quantum meruit covers this excess work requested, ordered or directed, or which has been acquiesced in or accepted by the owner as being "new and different work" not covered by the estimates and bids, and upon which the minds never met.

*Salt Lake City v. Smith*, 104 F. 457.

*Freund v. United States*, 260 U. S. 60.

*Mahoney v. Hartford Invest. Corp.*, 82 Conn., 280.

*E. & F. Constr. Co., v. Stamford*, 114 Conn., 250.

51 Yale L. J. 162, and cases cited.

76 A. L. R. 258, and Anno. 268ff, and cases discussed.

It allows relief without the stigma of damages and misrepresentation and it is not necessary to disturb the express contract nor to call into use any of its unfair and unconscionable exculpatory clauses.

Both lower Courts were clearly wrong in holding that "Hence this contract and these provisions . . . must determine the present claim unless it is proven that they were modified by either a new agreement or the defendant's waiver of provisions for its benefit and protection . . ." (R. p. 26; 133 F. 2d. par. 1, p. 469). Such a narrow construction—solely a question of law—is clearly erroneous.

Said Courts emphasized and further extended their errors in refusing to apply the local law of waiver as laid down in *Mahoney v. Hartford Invest. Corp.*, 82 Conn., 280, 287, where it was held that "directions by him, for the performance of this work not called for by the contract, are necessarily and

of themselves a waiver of any requirement for written orders . . . .”

See *Anno. 66 A. L. R. 650ff*, and many cases discussed.

The same applies to their *refusal to consider or apply our local law of estoppel*, as laid down in the latter and other cases cited in Main Brief, (pp. 8, 9), and others there cited. *Estoppel is particularly appropriate* here because respondent's *general agents* were present, *admittedly*, and *knew both the nature and extent of all work done*. (Ex. 23).

*Blakeslee v. Water Comrs.*, 121 Conn., 163, 180.

Simply stated, estopped allows recovery where equity and good conscience require, irrespective of legal rights.

*Basak v. Damietz*, 105 Conn., 378.

Both said Courts were clearly wrong, *not only* in their refusal to apply the above and other *equitable principles* claimed, *but also* in their *construction of the contract*, which *in effect*, gave the *Engineer unreasonable power and discretion to enlarge and remould it*, and afterwards, *to construe the law of the contract*. This is both against *public policy* and against the *weight of authority*.

*Freund v. United States*, 260 U. S. 60.

*Salt Lake City v. Smith*, 104 F. 457.

*Anno. 137 A. L. R. 530ff* ( and cases discussed.

*United States v. Stage Co.*, 199 U. S. 414, and cases cited.

Cases cited, Main Brief, pp. 21-23.

Both said Courts were clearly wrong in *failing to hold* that the *exculpatory provisions* of the contract, in this, and usual in such contracts, that the contractor relies on his own examination of the site, and the owner shall not be responsible for any errors, inaccuracies, and the like, *are against public policy and unenforcible*.

*Ford v. Dubiskie*, 105 Conn., 572 and cases cited.

*Bridger v. Goldsmith*, 38 N. E. 458ff.

*Ganbay Bros. v. Butler Bros.*, 56 A. L. R. 1, and Annotation.

Generally, and as embracing good reasoning and application of the law to *dry words* and *broad stipulations* common in corporation contracts, and reaching a just result, the attention of the Court is invited to *Salt Lake City v. Smith*, *supra*, where the Court says:

"... No such work was in the minds of the parties when they made this contract, nor could they have intended to authorize so radical an alteration of the nature of the work as to require it. Since they did not contemplate or intend to contract concerning it . . . it was new and different work . . . and the plaintiffs were entitled to recover its reasonable value . . . This was the theory upon which the case was tried, and it was the true theory. It is just to the city, fair to the contractors, and it accords with reason and established law. The dry words and broad stipulations of contracts must be read in the light of reason and of the subject contemplated by the parties. The stipulation common to many corporation contracts, that contractors may be required to perform extra work at the price named in the agreement or fixed by an engineer, is limited by the subject matter of the contract to such proportionately small amounts of extra work as may become necessary to the completion of the undertaking contemplated . . . when the contract was made; and work which does not fall within this limitation is new and different from that covered by the agreement, and the contractors may recover the reasonable value thereof notwithstanding the contract. The customary provision . . . that the corporation or its engineer may make any necessary or desirable alterations . . . is limited in the same way . . . to such modifications of the work described in the contract as do not radically change its nature or its cost . . . work required by such alterations that are substantially variant in character and cost from that contemplated . . . constitute new and different work, not governed by the agreement, for which the contractors may recover its reasonable value (citing *Henderson Bridge Co. v. McGrath*, 134 U. S. 260; *Elgin v. Joslyn*, 26 N. E. 1090, both leading cases, and others).

The stipulation . . . that all questions, differences, or controversies between the corporation and the contractors under or in reference to the agreement and the specifications or the performance or non-performance of the work . . . shall be referred to the engineer, and his decision thereof shall be final and conclusive . . . does not give the engineer jurisdiction to determine that work which is not done under the contract or specifications, and which is not governed by them, was performed under the agreement and is controlled by it, and his decision to that effect is not conclusive on the parties. Neither an engineer nor a judge who has no jurisdiction of a question can confer jurisdiction of it upon himself by erroneously deciding that he has it . . .”

*A contract embodies the law of the place of making and performance.*

*Wood v. Lovett, 313 U. S. 362.*

The above cases and their reasoning and application, lead inescapably to the conclusion that both said Courts clearly erred in their construction and application of the this a Connecticut contract. In *Montrose Constr. Co. v. Westchester County*, 80 F. 2d. 841 and 94 F. 2d. 580, the *Second Circuit construed* such a contract and reached a *different result from that reached here*. It quoted with approval from the *Salt Lake City* case, *supra*, applied the reasoning therein, despite a provision in the contract that no more than 600' of compressed air would be paid for no matter how extensive such use was necessary to complete the contract work. While it called recovery damages in relying on a warranty in making the bid, in reality it was because the provisions of the contract “cannot be given the effect of completely negating the representations in the plans . . .”

Counsel erroneously says (Brief, p. 4) that examination shows in every instance the court found in favor of the prevailing party the facts upon which it based its decision, and argues that this Court must also accept the facts found under Rule 52 F. R. C. P. This rule expressly *excepts findings which are clearly erroneous*.

In the *Freund* case, *supra*, this Court rejected the conclusions of the trial court; and likewise, in the *Montrose* case, the *E. & F.* case, the *Mazzotta* case, *all supra*. The *Mazzotta* case, *supra*, is particularly in point, because our Supreme Court held that the construction of a contract and specifications presents a question of law, and reversed the trial court. Briefness forbids further analysis, but the rule allows and it is almost universally held that where a finding is based on a *misconception of the law material to the issues*, it will be set aside or modified or judgment entered as justice requires.

*Davis v. Margolis*, 107 Conn., 417, 422.

— An erroneous conclusion is an error of law and not an error in an inference of fact.

*Hayden v. Allyn*, 55 Conn., 280, 289.

This Honorable Court may place the proper construction on this contract, regardless of the finding.

*Columbia Water Pow. Co. v. Columbia El. Co.*,  
172 U. S. 475.

*Beckwith v. Farmington*, 77 Conn., 318, 320

It may substitute its judgment for the lower Courts if they erred in the application of the rules of law material to the case, or, the conclusions of the lower Courts are violative of rules of logic, reason, and are contrary to or inconsistent with subordinate facts or so illogical, unreasonable or arbitrary as to be unwarranted in law.

*Johnson v. Shattuck*, 125 Conn., 60, 62-3.

*Deputy v. Dupont*, 308 U. S. 488, 489.

*Bogardus v. Comr.*, 302 U. S. 34.

On an appeal in equity the appellate court should review facts as well as law; the finding is not conclusive—otherwise such a review would be a *delusion and a snare*.

*Colby v. Riggs Nat'l Bk.*, 92 F. 2d. 182, and cases cited.

This is especially true where the contract is in writing and only questions of law presented.

*United States v. Ga. Ry. Co.*, 107 F. 2d. 3.

*As the entire record is before this Honorable Court, it has power to direct the disposition which should have been made on appeal, notwithstanding certain errors of law were not argued, nor presented by the Petition.*

*Kessler v. Strecker*, 307 U. S. 22.

*Story Parchment Co. v. Patterson Etc. Co.*, 282 U. S. 555.

#### CLAIM NO. 1 PERFORMED CRADLE WORK, \$22,626

Respondent's claim that this claim is covered by the provisions of the contract and specifications and is, in reality, Type C construction, and that in Type C construction foundation concrete was required to be "cured" before laying the pipe thereon, *is too extravagant a construction of the contract to be entertained for a moment.* It is a fair presumption, that had such "curing" been anticipated by respondent, and it *openly wished* it to become a part of the contract, such procedure would have been adequately "described" to give petitioner a reasonable opportunity to figure the additional cost thereof in its bid. It would have then become a prominent feature of the agreement, as it should be—if fair and honest dealing is maintained.

*Alford v. Belden*, 4 Conn., 461, 464-5.

*Mahoney v. Hartford Invest. Corp.*, 82 Conn., 280, 284-5.

In the latter case, our Supreme Court says:

"Had it been anticipated that this entire drainage system was defective, and that a new one would have to be substituted, it is fair to presume that the repair of it would have constituted a definite feature of the written agreement . . ."

Respondent *admits* preformed cradle is not described in the contract specifications (Respondent's Brief, p. 10). It argues, however, that under Ex. A, p. 40, par. 2, this method of preforming the foundation concrete—or Type C—is to be considered properly described, and that even to a layman no planks and sills are shown on Type C and the indication is of some “formed foundation” on which the sewer pipe rests; that it cannot be installed, unless it is preformed—a process known as “curing”.

A complete answer to all of these and other like contentions is: Respondent knew how to write specifications for “curing”, and did write them concerning the “curing” of the pipe itself—which petitioner obtained from the Lock-Joint Pipe Company with respondent's approval. See Ex. A. par. 65, p. 63 under *one* method, pipe were to be “cured” until “6 days old”; by another until “3 days old.”

Had it *openly* anticipated “curing” in Type C, it could have *as effectively described the method of construction and the curing period of it!* Common honesty and fair dealing would require such a description—and it would have become a *prominent and definite* feature of the agreement.

*Alford v. Belden*, 4 Conn., 461, 464-5.

*Mahoney v. Hartford Invest. Corp.*, 82 Conn., 280, 284-5.

*But respondent described “in detail” “another entirely different method of construction of Type C in the contract and specifications, and definitely contracted that this different method should govern.”* (Ex. A, par. 82, p. 71).

This was the *first* of the “Special Provisions”, which, by Ex. A, p. 40, provided:

“Should the requirements of the Special Provisions at the end of these specifications conflict with any requirements preceding them the Special Provisions shall govern.”

In the very first line of par. 82, Ex. A, p. 71, Types B-1, B-2 and *C Construction* are to be construed as therein fully set forth, all by the *same method, exactly*.

The trial court held (R. p. 32) :

" . . . It is obvious that Types A and B-1 and B-2 do not require preforming or curing of the concrete base . . . ;" but went on immediately to reason—contrary to the above specifications in par. 82, Ex. A, p. 71—that Type C would have to be "preformed." (R. p. 32ff.).

It then refers to *Exs. C and D* to support its reasoning, but said (R. p. 33) :

"Plaintiff also asserts that the specifications of the contract set forth in Ex. A negative the time interval for curing. These are not wholly free from ambiguity . . ."

We have shown (Main Brief, pp. 26-30) that *Exs. C and D reasonably construed do not support the lower Courts in their conclusions that preforming or curing was required; or even reasonably described, so as to indicate to a bidder that "curing" would be required by the Engineer. This, respondent's Engineer admitted (p. 942), but nevertheless, both Courts erroneously construed Exs. C and D as requiring the cradle to be "cured", despite the admission and the detailed description of the prescribed methods of constructions set forth in the specifications, reaching its conclusions by ascribing a very extensive discretion in the Engineer, and contractual powers to so enlarge and remould the contract. This was not only clearly erroneous, illogical, unreasonable and uncarranted in law, but was diametrically opposed to the explicit terms of the contract, restricting both his discretion and his contractual powers, if any, to: "The Engineer will direct which method is to be used." The two methods were:*

(1) The pipe may be laid upon *approved sills* and the concrete poured *in place underneath and around the pipe,*

or

(2) the *sills* may be set and concrete poured to a point slightly above the bottom of the pipe, and the pipe immediately laid upon the fresh concrete and sills; the remaining concrete to follow closely. The Engineer will direct which method is to be used. We submit that by no process of logical reasoning could one arrive at a conclusion that the foundation concrete would have to be "cured" before the pipe is laid, under any reasonable construction of the contract, which prevails over the plans.

*Cruthers v. Donohue*, 85 Conn., 629, and cases cited.

*Wilson v. Riddle*, 128 Conn., 100, 103.

Neither the Engineer nor the Courts have jurisdiction nor could he or they confer it on themselves, to enlarge and remould the contract and specifications nor to so misconstrue the contract.

*Salt Lake City v. Smith*, *supra*.

*Freund v. United States*, 260 U. S. 60.

*Anno*. 137 A. L. R. 542ff. and cases discussed.

Had the contract been ambiguous, both Courts should have construed it in favor of petitioner.

*Horgan v. Mayor*, 55 N. E. 204.

*Drainage Dist. v. Rude*, 21 F. 2d. 257.

There are circumstances that show beyond doubt that even respondent did not honestly consider this preformed cradle as Type C construction. Neither Ex. F nor Ex. G even "mention" or pretend to be Type C—both were prepared and approved by Mr. Brewer after the contract was made and just before the work was to be constructed under them. None of respondent's records and diaries mention this as Type C, although its inspectors frequently noted that work was Type A, B-1 or B-2 construction. (Ex. 23, Inspector's Diary Sections). It did not allege in its answer that it was

*Type C*; its claim was made *first* in the trial, all of which shows *conclusively* that the idea of *preformed cradle being Type C* was *indisputably* an *afterthought*.

The *payment clauses* referred to in the finding (R. p. 33) do not *purport* to cover *labor nor delay—only materials at unit prices*. Moreover, it is the *contract that prevails* over the *plans*, and the *blueprints cannot add to nor vary its terms*. It follows as a *matter of law* a *method of construction of preforming the concrete was new and different work*.

When even *Mr. Brewer, respondent's Engineer in charge*, admittedly had no knowledge of, and had not observed any *preformed cradle being constructed elsewhere than in Hartford* (p. 942) it is *understandable, as counsel admits, that Mr. Ciraci, petitioner's President, was not acquainted with this type of construction*. (Respondent's own testimony shows only 600' in Hartford, (p. 1121). This is all the more *reason why a reasonable description of it should have been included in the contract*. The law does not require a party to a contract to be a *mind-reader*, delving into and ascertaining the *secret intentions* of the other party; it was the *highest duty of respondent to fully and fairly disclose them*.

*Water Comrs. v. Robbins, 82 Conn., 623, 646.*

Certainly respondent could not and does not claim that use of such "curing" in *three out of eighteen contracts in Hartford, 600' in several miles was an usage or custom binding petitioner*. Sound policy does not permit encouragement of the tendency to construe contracts with regard to *local usages which the parties made no reference to when the contract was made*.

*Partridge v. Phoenix Mut. Life Ins. Co., 15 Wall. 573.*

Moreover, a *written and express contract cannot be controlled nor varied by a local custom or usage*.

*Moore v. United States, 196 U. S. 157.*

The *secret intention* of respondent, that Exs. F and G, should not constitute "written orders", but were *illustrative of Type C* falls within the above principles and is *untenable*. Had it so *openly intended* them, it would doubtless referred to *Type C on their face*.

The *importance* of "grout", as respondent well knows, does not lie in the cost of *material* but because it *changes materially* the "*method*" of construction from *progressive* to one of *slowness*.

Every day's *delay* adds *materially* to the expenses of the job, by *disrupting and disorganizing the work*. Respondent admitted this by testifying that *41 days delay was caused* (p. 1146), making claim No. 1 about \$15,000 but *erroneously divided this by 3, the number of gangs*. Mr. Buck's qualification as *expert engineer and cost accountant*, far surpassed those of Mr. Stevens, an *employee of respondent*. Compare their qualifications (Mr. Buck, pp. 761-2, with Mr. Stevens, pp. 1139-40). We also invite comparison of their entire testimony for fairness and reasonableness, which accounts for our calling an "outside" engineer, because we wanted a *fair and impartial expert witness* and not a mere *biased and servile employee*.

Moreover, claimed payment for "grout" is *comparable* with respondent's claim that giving "written orders" for about \$450 of *small extras*, should *excuse it from paying* about \$68,000 *worth of large extras* which it received and retains; also with its claim in *Blakeslee v. Water Comrs.* 121 Conn., 163, 185, while *negotiations were pending to settle the dispute over extra costs due to war conditions*, respondent *pleaded payment* because plaintiffs had signed a receipt for money due on final estimate, which, of course, our Supreme Court brushed aside and upheld recovery of the real damages amounting with interest to about \$300,000. This accounts then for respondent's present attitude or habit of *balancing equities by setting off in argument small things to escape payment for larger just claims*. In that case, too,

it alleged the *unconstitutionality* of the very Act it had sponsored before the legislature to enable it to pay plaintiff's claim, and denied the authority of its general manager. This was also unsuccessful, as respondent has always been in every case previous to this one.

*Blakeslee v. Water Comrs.*, 106 Conn., 642; 121 Conn. 163 p. 80.

No Court in the United States, state or federal, has ever sanctioned the attitude or reasoning of counsel, or else he would have cited at least one case to support his claims. Never has respondent nor other litigant won a case in Connecticut on principles so *unjust* as counsel claims. All modern, and the great weight of authority is opposed to such principles.

Williston on Contracts, Sec. 1972a, Sec. 1479, and cases cited, in this and main Brief.

*Xanthahey v. Hayes*, 107 Conn., 459, 469ff.

Mr. Buck's testimony, (pp. 761-1202), and his Rebuttal, (pp. 1203ff), is *reasonable and logical, fair and impartial, supporting fully all of our claims both in theory and in reasonableness*; but the lower Courts exhibited a *capricious disbelief* of his, and all of our testimony; without regard to *reason and logic* (when it should have adopted it as the only fair and reasonable construction of the contract and its application) and contrary to the authorities in Connecticut and elsewhere. No type of soil would require preformed cradle (p. 803).

*This capricious and unreasonable refusal to credit petitioner's testimony and the Finding and Construction of the contract is so unreasonable as matters of law as to justify judicial interference.*

*Fiengo v. Vitale Inc.*, 125 Conn., 559.  
*Deputy v. DuPont*, *supra*.

The grounds on which the testimony of respondent's expert witnesses rest is so unreasonable as to make it clearly erroneous to base a decision upon it.

*Kulak v. Landers, Frary & Clark*, 120 Conn., 606.

*Jones v. Jones*, 199 Atl. (Md.) 513.

*Wigmore, Evid.*, Sec. 659.

Expert testimony must be too evident for doubt before it can overcome the documentary evidence, here, to which it is opposed.

*Berardini v. Kay*, 192 Atl. (Me) 882.

Respondent's evidence is opposed to all natural laws, common experience, and the weight of reason so this Court may judicially notice its incredibility.

*R. C. L. Evid.*, Sec. 198; *Am. Jur. Evid.*, Secs. 1183-4.

132 A. L. R. 1391.

It was clearly error for both Courts to hold, in effect that petitioner must prove all of its case beyond a reasonable doubt.

*Esserman v. Madden*, 123 Conn., 388.

As the findings were made under a misconception of the law, this Honorable Court should render judgment herein despite same.

*Freund v. United States*, 260 U. S. 60.

*Gould v. Gould*, 78 Conn., 247, 250.

134 A. L. R. 1337.

*Lone Star Gas Co. v. Fort Worth*, 93 F. 2d. 584.

No logical reasons exist to allow respondent to escape payment of this, and all other claims, as it, with its superior knowledge of the situation, and familiarity with its own desires, could have expressed its secret intentions in a way that would have been fair and equitable to enforce, because

*then the increased expense would have been reflected in the bid.*

Respondent specified "sills" in Type C construction (Ex. A, p. 71, par. 82), and its own witness testified that sills could have been used. (Mr. DeMay, p. 1016). Ex. C shows no sills because it was to be used on piles (pp. 801-803). Common sense and practical reasons dictate it should bear the loss from so *material deviations from its own plans, especially as there was nothing therein to reasonably notify petitioner that "preformed cradle" would be required.* \$22,626 for this claim is too severe a loss to throw on petitioner.

*Williston on Contracts, supra.*

*51 Yale Law Jour.*, 162ff and cases discussed.

*76 A. L. R.* 268ff and cases discussed.

All other cases discussed herein and main Brief.

#### CLAIM NO. 2 EXTRA PUMPING, \$8345

Respondent seeks to escape payment for this claim because the *broken parallel lines* did not *designate what they represent.* Both Mr. Ciraci and Mr. Buck testified *positively* that here, and in all cases, they *designated an existing structure.* Respondent does not *deny* this, so it is to be *taken as true.*

*Evans v. Penn. Mut. Life*, 186 Atl. 133 (Pa.).  
*109 A. L. R.* 1517; *Am. Jur. Appeal*, Sec. 896.

Petitioner did not *need* to make *inquiries*-respondent was under the *highest duty to disclose all material facts*; in fact, it did *represent* that such an *outlet existed.* Petitioner was not required to be *unduly incredulous* nor to act at its *peril*, but was entitled to rely upon these representations and did rely on them.

*Water Comrs. v. Robbins*, 82 Conn., 623.

*E. & F. Construction Co., v. Stamford*, 114 Conn., 250, and cases cited.

*Freund v. United States*, 260 U. S. 60, and cases cited.

Mr. Ciraci made *no unwarranted assumption*-respondent is *liable* because it *represented an outlet to exist*, and petitioner could *reasonably assume* it could be used to *drain the project affected*, in the absence of any notice he could *not so use it*.

*Horgan v. Mayor*, 55 N. E. 204.

*United States v. Spearin*, 248 U. S. 132.

*Anno*. 76 A. L. R. 268ff and cases cited.

Petitioner also *reasonably relied* upon Mr. Brewer's *promise it would be ready in six weeks*, and his *promise any extras would be paid for when the sewer was complete*, and did the work without further protest, relying thereon.

*Tryon v. White*, 62 Conn., 161ff.

*United States v. Gibbons*, 109 U. S. 200.

Respondent did not *expect petitioner to examine the site, nor check up on the underground* (pp. 929, 968-970). Mr. Brewer testified it would have been *fairer to have made some notation on the plans that this outlet was not available to drain the work* (p. 915); as he *knew an outlet was of tremendous importance* (p. 916).

Respondent relied solely on Ex. A, p. 50, par. 29 in its *pleadings*, but when the *unfairness of such an interpretation* and the *absence of any notations, reasonably notifying petitioner of the true situation* was conceded by its witness, it sought to escape payment through its *secret intention*, it *could not have been used anyway!*—and, by saying petitioner would have had to find out (at its peril, about all of these concealments and non-disclosures, and despite its argument that this was part of a large project) about the *size and height* of this outlet. Common sense indicates that its *size and height would be such as to receive everything discharged from this part*, as that was the very *purpose* for which it existed—to carry off, by gravity, sewage, etc. *from our section of sewer*.

Mr. Brewer said that no more pumping was done than *any other contractor would have had to do*, (p. 936). This does not mean that *we did not do great quantities of extra pumping, over and above the usual amount*, covered by the above provision, but that, *as the plans stood*, with their *admitted shortcomings*, it was necessary to do it to *complete the job*.

*Petitioner should certainly not bear the loss in view of this admitted unfairness on the part of the respondent.*

*Freund v. United States*, 260 U. S. 60.

*Water Comrs. v. Robbins*, 82 Conn., 623.

*United States v. Spearin*, *supra*.

Anno. 76 A. L. R. 268 and cases cited and discussed.

There was no ground water on the plans, *except a little north of Crossing No. 4*; all the other was *low meadows, not swampy* (Mr. Brewer, p. 923). The difficulty encountered resulted largely because the underdrains discharged water at the working point, and rains, floods and such water had no place to go, thus immeasurably increasing the cost and expense of this pumping (Mr. Buck, p. 770). (See petition for further testimony with references to pages where found). It is evident that the *only reasonable conclusion* of a *reasoning mind* would be that this *extra expense should be paid by respondent* because it would be *unfair* for petitioner to bear the loss under the *admitted facts* on a reasonable construction of the contract.

CLAIM NO. 3. CONFLICTS, WOODSIDE CIRCLE,  
\$11,835.

Both Courts were clearly wrong in failing to distinguish between "supporting" the gas pipe at the side of the trench, and *removing and replacing* it because it was encountered at a *materially variant* place than represented on the plans;

and in construing the contract to throw all risk of loss on petitioner because it was an *underground structure*, and it had examined the site. The water main, stone foundation of old house, the sewer and the repavement come under the same principle. This is contrary to all the Connecticut cases cited, and to the law laid down by this Court, and in conflict with the great weight of state and federal Courts' decisions. These cases have already been cited and discussed in this and the main Brief to which reference is here made. 51 *Yale Law Jour.* 162ff, 76 *A. L. R.* 268, and cases cited and discussed therein show that *many theories* prevail for recovery by a contractor where *conditions are not as represented*; backed by the *reasoning* of the Courts in *granting recovery*. Respondent cites only *one* case to support his contention that recovery be denied. That case is distinguishable from this because there plaintiff sued to *rescind the contract*; and not to *recover damages*. It set up *intentional* misrepresentation as the basis of rescission, while we seek to recover on all theories allowed, including innocent misrepresentation, which is *strongly entrenched in Connecticut*, and *elsewhere*, as evolved and discussed in *E. & F. Constr. Co. v. Stamford*, 114 *Conn.*, 250ff, and cases cited therein. Some of the cases were decided by this Honorable Court, upon which our Supreme Court relied, in principle, to support its decision. The cases reach a *just result* regardless of the *theory of recovery*. Two cases were decided by the *Second Circuit*, which, prior to the instant decision, seemed to support recovery on similar principles; *Montrose Constr. Co. v. Westchester County*, 80 *F. 2d*, 841, and *United Constr. Co. v. Haverhill*, 9 *F. 2d* 538. Both are well-reasoned cases, and reach an equitable result, whereas, here, the same result is not obtained, although *there seems no reasonable basis for distinction*. Certainly, the *instant case threatens to overthrow our long-settled rules of law of contracts in Connecticut*, and to *disregard those laid down by this Honorable Court, other Circuits, and other state Courts*. It was *unfortunate* that the *Second Circuit* should have so

*clearly erred in its construction of the contract, and felt it was bound by the Finding, when the real issues presented were those of law and not of fact, and because the Finding was based on misconceptions of the law, and so unreasonable as to be unwarranted in law.*

#### CASES CITED HEREIN AND MAIN BRIEF.

This reasoning applies equally to claims Nos. 1, 2, 3, 5, 6, 9, 10, 11, 12, 13, 14, and 15, totalling over \$62,000 without interest.

*A great many of the things encountered were unknown to either party, as will be seen from discussion of them.*

#### CLAIM NO. 4. STONE FOUNDATION, \$428

The total yardage of stone ordered, exclusive of roadways and all other purposes, was 668 Cu. Yds. and respondent paid for 525, leaving 143 Cu. Yds. at \$3 or \$428. It is a small but just claim. It should be paid under item 17, p. 46, Ex. A.

#### CLAIM NO. 5. TESTING RIVER CROSSINGS, \$2281.

*It is well settled in Connecticut and in this Court that respondent impliedly warranted that if petitioner built these Crossings in accordance with its plans they would pass the leakage tests. Admittedly, they were so constructed (pp. 955-6). They did leak, so respondent is liable for the expense of testing and remedying them.*

*Hills v. Farmington, 70 Conn., 450*

*Williston on Contracts, (1924 Ed.) Sec. 1966,  
and cases, footnote 30*

*United States v. Spearin, 248 U. S. 132*

The contract placed the duty of measuring the leakage on its Engineer. Par. 79, p. 68-9, Ex. A. The Engineer

*waived or is estopped to assert this defense by waiting so long to make the tests, thus greatly increasing the difficulty and expense after they were completed and backfilled (pp. 778-780).*

CLAIM NO. 6. RELAYING DRIVE DRAIN, \$175.

*Neither party knew of this drain until encountered. It was not included in the bid price. Both Courts clearly erred in denying recovery because it was an underground structure.*

CLAIM NO. 7. ADDITIONAL SHEETING, \$575.

The case cited by respondent does not apply, for there the ultimate decision was agreed to reside in the Engineer (par. 87, p. 157). Here the ultimate *liability* was agreed to reside in petitioner in protecting the work. It should have the *ultimate decision* whether it should be left in.

*Dock Constr. Co. v. New York, 296 F. 377.  
(2d Cir.).*

CLAIM NO. 8. ADDITIONAL REINFORCING STEEL,  
\$199.

Respondent *admitted* (p. 1006) that 600 lbs. of steel was ordered by it but was not paid for. Our records (Ex. H, p. 36) shows 17,328 pounds were used, while 13,330 pounds were paid for, leaving 3,998 pounds not paid for. The loss is \$199. While this amount is small, respondent knows very well that Item 16, p. 81, Ex. A governs. (Ex. A, p. 40). It should be paid.

CLAIM NO. 9. SEWER CONFLICTS, \$1243.

Building *two extra bulkheads* was necessary because the old sewer *deviated* from the plans. Respondent corroborates

us that *two* were built, while the plans showed only *one*. It was the duty of Mr. Kilby to *direct* this work and instruct where the bulkheads were built. Because his judgment was as erroneous as the plans, respondent asserts it was our fault. There is no fair play in such an attitude. We were delayed two days.

The old brick sewer lying over the new sewer pipe had to be "cut away" and pressure "grouted". This delayed us 4 days. Respondent here gave the "inside" dimensions of the old sewer, whereas everywhere else it gave "outer" dimensions. There was *no* note that this old sewer would have to be cut away, as admittedly "good engineering" requires. (pp. 785, 810-11). Our claim can be *separated, except* as to *materials* which are \$54.05. It was clearly error to reject the claim for reasons stated, and because it was an *underground structure*. The responsibility of the bulkheads was upon Mr. Kilby as agent of respondent. He was acting for the Engineer whose duty it was to instruct how and where all work was done.

#### CLAIM NO. 10. PRIVATE DRAIN, \$299.

Respondent *paid* for *bypassing this sewer* to the river as an extra. It is *just as liable* for *pumping*, as extra, the *sewage that flowed from it*. It paid for one item. No reason exists why it should not pay the other.

*Henderson Bridge Co. v. McGrath*, 134 U. S. 260  
*Sartoris v. Utah*, 21 F. 2d, 1.

#### CLAIM NO. 11. DIVERTING OLD SEWER, \$325.

This was an *unforeseen difficulty as well as an underground structure*. The details and extra expense is shown

in Ex. H, p. 41. It was *new and different work*, discussed above. The Engineer had no jurisdiction.

*Salt Lake City v. Smith*, 104 F. 457  
*Sartoris v. Utah Constr. Co.* 21 F. 2d 1  
137 A. L. R. Anno, 542ff.

#### CLAIM NO. 12. TUNNELING UNDER TREES, \$1225.

The trial Court *unjustly* referred to this claim as a striking example of exaggeration (R. p. 40). It is submitted, however, that its construction of this and all other claims was *unjust, inequitable, hard and oppressive*. It would *seem impossible to believe* that a 12 foot tunnel for a 2 foot tree, allowing only 5 feet on each side of such a tree, would be a reasonable distance to protect even its large brace roots, while 50 feet would be necessary to protect all roots. *No tunnel work was shown on the plans here*, so the courts could at least, have awarded reasonable damages for this work.

#### CLAIM NO. 14. SPECIAL FOUNDATION SEAL, \$1843.

If this item is "foundation concrete" as respondent claims—and not "fill" as we claim, it is governed by par. 82, p. 71, Ex. A, where it *definitely says* it shall be *as shown on the plans*, and *on the plans* it is shown 6" thick by Scale on Ex. C. It, therefore, makes no difference which term is used. (Mr. Buck, pp. 816-817). Respondent *admits* its use for 1122.5' whereas our records show 234.5'. The extra cost was either \$1843 or half that sum. The Courts *clearly erred in denying it in toto*. Neither party could have reasonably contemplated that such concrete would be mixed and spread by hand in deep cuts handed into the trench by crane, instead of chuting it off the truck in the usual manner.

*Salt Lake City v. Smith, supra.*

CLAIM NO. 15. WINTER WORK, \$14,205.

This claim was *erroneously disallowed because delays upon which it is based were found not to have been due to any deviation from the contract terms.* (R. p. 41). *This is a question of law upon a true construction of the contract.* It necessarily follows that since it was *wrongly construed*, this claim should be paid. Mr. Buck, a local Consulting Engineer and Cost Accountant, testified that *all other claims* were reasonable, and likewise as to *this one*; and of the difficulties and expense due to winter conditions. (pp. 789, 791-3). He made a careful check-up to *eliminate duplications* and to see that the claims were *checking properly*, and testified that they were not only good legal, but also good, honest and equitable ones. (791-3). Other facts found by the Court fully corroborate him.

It found completion of the work by *March 31, 1938* (R. p. 44); and deducted liquidated damages after that date. (R. p. 46); it also found *out-of-pocket expenses—exclusive of equipment depreciation and of any profits—of more than \$20,000 in excess of payments.* (R. p. 41). This is *logically inconsistent with its conclusion* that no *new or different work was done*, especially when the Record is barren of any complaint of respondent the work was “unnecessarily or unreasonably” delayed, or that any other complaint was made under par. M (1), p. 27, Ex. A; it did not plead dissatisfaction, which must be pleaded and proved (Dean v. Conn. Tob. Co. 88 Conn., 619, 624); nor assumption of risk (French v. Mertz, 116 Conn., 18, 21); nor anything else to show *incompetency or fault on our part.*

Petitioner's case is, then, *fully symmetrical and balanced in all its parts—it took 9 months to complete a 6 months' contract which exceeds the time contemplated by both parties by 50%; it claims almost exactly 50% of the contract price as extras, or new and different work.* The contract price is *cogent evidence of the value both parties placed on 6 months' work and the reasonable price for it.* This is all the more

reasonable when petitioner had, in addition, to pay approved sub-contractors about \$5,000 to complete the work.

Protests are unnecessary to recovery.

*United States v. Gibbons*, 109 U. S. 200.  
*McCaffrey v. Groton, Etc. Ry. Co.*, 85 Conn.,  
584, 589-594 and cases cited.

The latter holds that *two real questions* are involved:

1. Whether the work was "without" his contract, and
2. Is defendant bound to pay for it—recovery was allowed. The test is: ought *respondent*, to have *expected* they were to pay for them.

*Withdrawal of a bid* subjects a party to *liability for damages*. Generally bids are held irrevocable.

*L. R. A.* 1915 *A*, 225, note and cases cited.  
*Freund v. United States*, 260 U. S. 60.  
*Anno.* 104, *A. L. R.* 1149, 22 *R. C. L.* p. 615.

*The price shall include clause* does not fairly apply to obstructions and difficulties under changed circumstances subsequently arising, though no written order given.

*Wood v. Ft. Wayne*, 119 U. S. 312.  
*Tompkins v. Bridgeport*, 100 Conn., 147, 154ff.

Both Courts clearly erred in construing a letter, Ex. 22, and its answer, Ex. 25 as a part of the contract. It was expressly understood the plans and specifications still controlled. It could not be implied such material changes affecting the rights and remedies of the parties was intended, when no consideration was given and it substitutes nothing in favor of petitioner.

*Westinghouse El. Co. v. Binghamton Ry. Co.*,  
257 F. 726.

Ex. 22 was admitted for one purpose only—to show our bid was "unbalanced" and that caused all our loss. Its use

for other purposes was *clearly improper*, when respondent was *mistaken*, and it was *undisputed* it resulted in *reducing the loss by \$4211*. Anyway, these were written *before* the contract was *executed*, and no mention was made therein about them. They cannot be even considered a part of the contract or used to vary its terms or to vary or increase the rights, remedies or liabilities of the parties.

*Highway Constr. Co. v. Miami*, 126 F. 2d. 777.

*Wadeford El. Co. v. Biggs Constr. Co.*, 116 F. 2d. 768.

*E. & F. Constr. Co. v. Stamford*, 114 Conn., 250, 255-6.

*Modification was not pleaded*, nor was it *proved*; read together, they show conclusively the *contract was not changed*.

*Lientz v. Wheeler*, 113 F. 2d. 767. Cert. Denied.

*None of our claims have a foundation in anything Ex. 22 referred to.* (See Main Brief, pp. 19-21).

#### CLAIM NO. 16. LIQUIDATED DAMAGES, \$3540.

In *O'Loughlin v. Poli*, 82 Conn., 427, 435, our Supreme Court held that Poli was not entitled to collect liquidated damages because orders were orally given for extra or additional work not contracted for, as necessarily the time for completion over-ran that set; and also that by giving such orders he had waived compliance with the written order provision of the contract. See also the Mahoney case, *supra*, and other cases cited. It is a *penalty provision* and a forfeiture here would be inequitable and against good conscience.

*Williston on Contracts*, Secs. 789, 850, 793.

The Court found (R. p. 43) that *respondent had promised in two letters to petitioner at least "consideration" under this clause of the contract, and might well have foregone its claim, but it had not done so. Evidently, the Courts felt, in view of the extensive discretion and contractual powers they erroneously construed to be in the Engineer relieved respondent from its promise, and with such dictatorial powers they had no right to interfere, or it shows that they were biased and prejudiced to such an extent that respondent might escape from payment of this and all other claims, regardless of whether they were written or oral.*

Respondent would be entitled to much more respect if it had offered some reason for so *flagrantly breaking its written promise* but it *has not chosen* to do so. This shows beyond question that its Engineer in this and all other claims has neither been fair nor honest in his interpreting the contract nor the law of the contract as a fair-minded and impartial arbiter which is universally required. On the contrary, he and respondent have tenaciously clung to benefits to which respondent is not justly entitled, and though they were derived by errors, misrepresentation, silence, and concealments in material respects as regards the nature, extent, quality, quantity, character and cost of the work to be done under plans admittedly prepared by its experts and which were submitted to bidders and expected them to make them the basis for bids.

Equity has long since perceived it is a kind of fraud to cling to benefits produced by even innocent misrepresentation. Respondent should heed the advice of this Honorable Court in saying:

"They must extricate themselves . . . by purging their business methods of a capacity to deceive . . ."

*Fed. Tr. Com. v. Algoma Lbr. Co., 291 U. S.  
67, 81.*

It would be manifestly unfair and unjust for petitioner to suffer such a large loss under the contract, and the admitted and undisputed circumstances of this case, and whether it did or did not comply with the written terms of the contract, which we have shown, we submit, *do not govern*. We are not trying to recover because the contract proved *unprofitable*, but base recovery upon *well-settled principles of law which have long been used in determining rights and remedies arising from contracts, and outside of contracts*, as laid down in applicable decisions of this State, and elsewhere, constituting the *great weight of authority*, and *consonant with reason and justice*. Our claims are based on the principle that it is manifestly fair to recover for unforeseen difficulties and expense encountered because of *obstacles, and methods of construction not anticipated and not reasonably within the contemplation of the parties when they made the contract*. On this basis we have the *overwhelming weight of authority in this Court, in Connecticut and elsewhere, too numerous to even cite in Briefs*. It is *not surprising* that counsel cites no cases on the *main issues* here because the law and reason are against him, and his position is contrary to those fine qualities dominant in mankind which we have called right-thinking and Equity.

### CONCLUSION.

It is respectfully submitted that the applicable decisions of the Supreme Court of Connecticut; of this Honorable Court; of other Circuit Courts of Appeal, and the great weight of authority in State Courts show conclusively that both lower Courts *clearly erred* in construing and applying the contract and petitioner's rights and remedies thereunder; that a harsh, oppressive, unjust and unreasonable construction was placed thereon, when they should have been so determined as to do justice to both parties and to avoid injustice to one, and unjust enrichment to the other; that said Courts clearly erred in all the particulars set forth in

the Petition and the Record, none of which are waived, though brevity forbade their specific inclusion; that the rules of law laid down herein threaten to over-throw the local laws and rights of contract, and remedies thereunder, and, outside of contracts, as applicable to our claims herein set forth, and to introduce therein harsh and oppressive rules of law not heretofore obtaining; it will also tend to influence and over-throw like rules of fair and just laws elsewhere; and that the result reached is *contrary* to those fair and just rules of applicable law as laid down by this Honorable Court.

It would be *far better*, we submit, to *grant this Petition and review the case on its merits*, than to allow such *erroneous judgment to stand*, which might be impliedly construed as approval by this Honorable Court, thus causing the pendulum of justice to swing backwards and away from our fair and just local law long established, as well as from like rules long established in other jurisdictions; this is especially so when every step in the evolution of such applicable law has cost endless and bitter struggles of right against might. *To deny this Petition would tend to clinch innumerable future wrongs in this most important field of law, locally and generally, by making such unconscionable construction of contracts incontestable.*

Respectfully submitted,

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A member of the Bar of the United  
States Supreme Court.

and

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